No. 82-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

I.A.M. NATIONAL PENSION FUND,
Petitioner,
v.
MADGE H. ELSER AND MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT

1. Respondents appear principally to contend (Opp. 4-5) that certiorari should be denied because the decision below is independently supportable on two grounds relied upon by the district court and not reviewed in the court of appeals. In the context of this case, however, the argument makes absolutely no sense.[1] It is, of course, true

[1] Also nonsensical is respondents' newly raised assertion (Opp. 5) that the court of appeals decision is independently supportable because the Fund's cancellation of their past service credits

> violated Section 203(c)(1)(B) of ERISA, 29 U.S.C. § 1053 (c)(1)(B), in that by cancelling Respondents' past service credit, the Petitioner divested the Respondents of a vested pen-

that review by this Court may not be appropriate where the decision of which review is sought was based upon several independent or alternative rationales, not all of which are challenged by the petition for certiorari. Thus, the Court will ordinarily decline review where it appears that the issues sought to be raised would not be reached in this Court if review were granted.[2] That, however, is hardly this case.

As the Fund's petition demonstrated, the decision below rested entirely upon an analysis of the jurisdictional reach of LMRA § 302(c)(5) which is squarely in conflict with this Court's decision in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982). Similarly the district court's disposition of the case turned upon its erroneous resolution of the same central legal issue. That issue is the intended scope of federal court jurisdiction to scrutinize for "reasonableness"—and modify—pension eligibility standards established by the trustees. Both courts below exercised virtually plenary power to superintend the Fund Trus-

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sion without first affording them the statutory 203(c)(1)(B) option.

The assertion is unsupported by references either to the record or decisions below, or to any controlling legal authority.

As respondents are surely aware, ERISA § 203(c)(1)(B) plainly has no pertinence here. The "option" prescribed by that provision is required only if a plan is amended in a way which changes the previously-adopted vesting schedule. No such amendment occurred in this case, however; the vesting and past service cancellation provisions in Plan A were, in all respects here pertinent, unchanged throughout the entire period of Waste King's participation as a contributing employer in the Fund. Respondents' reliance on such mere gossamer as this fanciful contention clearly is unavailing.

[2] *E.g.*, *Cichos v. Indiana*, 385 U.S. 76 (1966); *Hodges v. United States*, 368 U.S. 139 (1961); *see* R. Stern & E. Gressman, *Supreme Court Practice* 272, 490 (5th ed. 1978); *cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

tees' design and implementation of the Plan A eligibility rules. It is to review and correct those actions that the Fund seeks this Court's review.[3]

2. Respondents' assertion (Opp. 5, n. 4) that "the circuit court's holding turns upon its own set of unique facts and will affect few if any litigants other than those involved in this proceeding" is betrayed as fatuous, both by the conspicuous absence of any identification of "unique facts,"[4] and by respondents' own recitation (Opp. 9-10) of the dire consequences which will, in their judgment, result from reversal of the decision below. Clearly, respondents do not believe that the "unique facts" of this case would limit the impact of this Court's reversal of the decision to these litigants. On the contrary, respondents cry in alarm that reversal would result in the demise of the

> arbitrary and capricious standard of review in evaluating trustee conduct under Section 302 of the LMRA and ERISA [and] allow trustees to act whimsically, arbitrarily and capriciously in disbursing pension contributions as long as the compensation is received by *any* participant or beneficiary of the plan without any judicial supervision or intervention whatsoever!

(Opp. 9). Stripped of its pejorative tone, respondents' characterization of the result of a reversal here is quite correct: it *would* permit trustees to prescribe eligibility rules which meet specific ERISA requirements without

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[3] Even if it were true that the result reached in the court below might not ultimately change on remand after a reversal by this Court, certiorari would nevertheless be appropriate because the issue presented on the petition is one of major importance in the continuing development of ERISA law, on which the decision below will serve as precedent unless corrected by this Court. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 535, n. 14 (1975); text at 4, n. 5, *infra*.

[4] Respondents apparently adopt as their own the summary of facts contained in the court of appeals opinion (Opp. 3). Nothing in that opinion suggests, however, that the court believed the facts to be "unique," or the issues to be of limited importance.

"any restriction on the allocation of the funds among the persons protected by § 302(c)(5)." *Robinson*, 455 U.S. at 572. It is precisely because *Robinson* mandates that result that we have urged the Court to grant certiorari and reverse the decision below.

3. Finally, respondents claim that the decision below is fully in harmony with *Robinson*. Once again, however, respondents' own description of the substantive standards governing Section 302(c)(5) review, which the court below adopted to define the scope of review available under ERISA § 404, belies their argument and instead graphically demonstrates the conflict between the decisions. Thus, notwithstanding the *Robinson* holding that the statutory language of Section 302(c)(5) imposes no "reasonableness requirement," respondents describe that statute as permitting forfeiture of past service credit "*under reasonable circumstances*" (Opp. 8). They claim further that ERISA § 404 merely carried forward the preexisting rule permitting such past service cancellation "*as long as it was reasonable under the circumstances*" (Opp. 8), and that Section 404 thus empowers the federal courts to insure "that trustees act *reasonably* and *equitably* in making pension eligibility determinations" (Opp. 10) (emphasis added). The assertion (Opp. 9) that the Fund has cited "no case authority for a contrary conclusion" inexplicably fails to account for our prominent and repeated citation of *Robinson*.

CONCLUSION

Far from demonstrating persuasive reasons for denying the Fund's petition, respondents' opposition further demonstrates both the irreconcilable conflict between the decision below and *Robinson*, and the importance of obtaining the authoritative resolution of that conflict which only this Court can provide.[5] The Fund therefore re-

[5] The Sixth Circuit has joined the Ninth Circuit in restricting the application of *Robinson* to collectively bargained eligibility de-

spectfully repeats its request that its petition for writ of certiorari be granted.

Respectfully submitted,

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terminations. *Sellers v. O'Connell*, No. 81-5829 (6th Cir. Feb. 28, 1983). The *Sellers* decision highlights the significance to the development of federal employee benefit law of the issue which this petition raises. There the court refused to hold that "*Robinson* governs trust fund rules formulated by trustees as well as those included in collectively bargained agreements" "absent a clear indication" from this Court that it should (slip op. at 3). Several district courts have taken a similarly limited view of the impact of *Robinson*. *Street v. Huge*, 555 F. Supp. 357 (W.D. Va. 1983); *Kozlesky v. Board of Trustees*, 546 F. Supp. 466 (E.D. Mich. 1982); *Short v. United Mine Workers of America 1950 Pension Trust*, No. 82-2180 (D.D.C. Jan. 28, 1983) (citing the Ninth Circuit's decision in *Elser* with approval).